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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ADR  
PVT

YOTTAMARK, INC., a California  
corporation,

Case No.:

C09-03055

Plaintiff,

**COMPLAINT FOR  
MISAPPROPRIATION OF TRADE  
SECRETS, COPYRIGHT  
INFRINGEMENT, ACCOUNTING,  
CONSPIRACY, AND BREACH OF  
CONTRACT**

vs.

TRACEGAINS, INC., a Colorado  
corporation, and BRADLEY LONG, an  
individual,

DEMAND FOR JURY TRIAL

Defendants.

Plaintiff YottaMark, Inc. alleges:

1. **Jurisdiction.** This court has diversity jurisdiction of this action under 28 U.S.C.  
§ 1332 because:

a. Plaintiff YottaMark, Inc. ("YottaMark" or "Plaintiff") is a corporation  
organized under the laws of the State of Delaware, qualified to do business in the State of  
California, and having its principal place of business in Redwood City, California;

b. Defendant TraceGains, Inc. ("TraceGains") is a corporation incorporated  
under the laws of the State of Delaware, qualified to do business in the State of Colorado, and  
having its principal place of business in the Longmont, Colorado;

1 c. Defendant Bradley Long ("Long") is an individual and citizen of  
2 Matthews, North Carolina;

3 d. There is complete diversity of citizenship between the Plaintiff and  
4 Defendants; and

5 e. The amount in controversy exceeds \$75,000.00, exclusive of interest and  
6 costs.

7 2. This court has personal jurisdiction over Defendant TraceGains because  
8 TraceGains employs sales representatives that market and sell its products within California.  
9 Plaintiff is informed and believes and thereon alleges that Defendant TraceGains employs a  
10 Vice President of Sales for the Western Region who maintains a presence in the San Francisco  
11 Bay Area. Therefore, TraceGains has purposefully availed itself of the privilege of conducting  
12 activities in California.

13 3. This court also has personal jurisdiction over Defendant Long because as part of  
14 his employment with Plaintiff, Long received and executed a "Nondisclosure Agreement."  
15 Paragraph 16 of the Nondisclosure Agreement states that "[t]his Agreement shall be governed  
16 by the laws of the State of California, without reference to conflict of laws principles." During  
17 the course of his employment by YottaMark, Long regularly traveled to California and attended  
18 sales meetings at Plaintiff's offices at which many of the proprietary information and trade  
19 secrets at issue in this suit were disclosed to him. By execution of the Nondisclosure Agreement  
20 and his business trips to California, Long has purposefully availed himself of the privilege of  
21 conducting activities in California.

22 4. In addition, because this action arises under the copyright laws of the United  
23 States, this court has subject matter jurisdiction pursuant to the provisions of 28 U.S.C. § 1331,  
24 1338, and the provisions of 15 U.S.C. § 1121.

25 5. This court has supplemental jurisdiction over this matter pursuant to 28 U.S.C. §  
26 1367(a) as to the additional claims of misappropriation of trade secrets, conspiracy, and breach  
27

1 of contract that are related to foregoing claims in the action within the court's original  
2 jurisdiction, since they form part of the same case or controversy under Article III of the United  
3 States Constitution.

4 6. **Venue.** Venue is proper in the Northern District of California pursuant to 28  
5 U.S.C. § 1391(b) and (c) because a substantial part of the events giving rise to the claims  
6 occurred in this district.

7 7. Plaintiff demands a jury trial. Fed. R. Civ. Pro. § 38(b); Federal CRC 3-6.

8 8. Plaintiff is informed and believes and thereon alleges that Defendants  
9 TraceGains and Long, and each of them, are responsible in some manner for the events and  
10 happenings herein referred to, and caused injuries and damages proximately thereby to Plaintiff  
11 as alleged herein.

12 9. **Intradistrict Assignment.** Local Rule 3-2(c) allows for a district wide  
13 assignment for intellectual property actions. Plaintiff requests that the case be assigned to  
14 either the Oakland or San Francisco divisions of this Court.

15 10. **General Allegations.** YottaMark specializes in product traceability and  
16 authentication solutions. Leading companies in the fresh foods, electronics and consumer goods  
17 industries rely on YottaMark's robust traceability platform to conduct precise trace back,  
18 enhance communication, and increase security in their supply chain. YottaMark has developed  
19 proprietary solutions to a wide range of traceability and authentication challenges.

20 11. Since 2007, YottaMark has used the federally registered trademark  
21 HarvestMark® ("HarvestMark") in connection with its food and agriculture tracing solutions.  
22 The goal of tracing in the food industry is to allow companies, consumers, and investigators to  
23 rapidly identify the source of a product and/or the path it took through the supply chain. The  
24 central goal is to make food recalls narrower and faster because of heightened and immediate  
25 accuracy of information. If the source of contaminated product can be isolated quickly, then  
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1 unaffected products can be sold again, and consumers can have confidence that the products  
2 they are buying are safe.

3 12. While many farms, distributors, and retailers have programs that trace produce  
4 within their own operations, few have established programs that allow access to trace data  
5 outside their enterprise and few engage in standardized trace labeling. YottaMark is one of  
6 several companies that specialize in providing a solution that allows produce to be traced from  
7 the harvest or packing event to the consumer, with information on its path along that route.

8 13. HarvestMark is the industry's fastest growing produce traceability application. It  
9 incorporates a system of software that generates unique, encrypted codes which can be affixed  
10 to every package or item sold to a retailer, distributor, or consumer, and which associates those  
11 codes with information about the product, together with report generation capabilities and  
12 analytic tools enabling growers, shippers, packing houses, distributors and retailers to examine  
13 production volumes, consumer feedback, quality issues and other matters. The encrypted codes  
14 can be scanned throughout a product's journey from farm to consumer, and the resulting  
15 information can be accessed by entering the product code at the HarvestMark website or at  
16 specific customer websites.

17 14. YottaMark has distinguished itself as a pioneer in the industry when compared to  
18 its competitors. YottaMark's business is characterized by the high cost of customer acquisition  
19 followed by a long term, annuity based revenue stream. Selling to customers in this industry is  
20 time consuming and expensive, with a typical timeline of 9 to 18 months from first contact with  
21 a prospective customer to closing a sale.

22 15. Because there are currently no mandatory food safety standards that require  
23 farm-to-fork traceability, not every food producer is willing to invest the time or money into  
24 adopting a trace program. Therefore, YottaMark expends significant effort in explaining the  
25 benefits of a customer's adoption of its services and working with potential customers to  
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1 understand and meet their unique needs before it can close a sale. Thereafter, however,  
2 YottaMark's customer retention is extremely high.

3 16. YottaMark has invested millions of dollars building a deep understanding of the  
4 structure of the produce industry, its membership, and the connectivity between members. This  
5 includes non-disclosure agreements and confidentiality provisions with employees, partners,  
6 advisors and customers.

7 17. **The GTIN Assignment Tool.** One of several proprietary items which  
8 Defendants Long and TraceGains misappropriated from YottaMark is YottaMark's proprietary  
9 GTIN Assignment Tool.

10 18. There is no federal or state imposed requirement for produce manufacturers to be  
11 able to trace their goods from harvest to distributor, retailer, restaurant or end consumer.  
12 However, factors including widespread food recalls wreaking havoc on food distribution  
13 prompted some of the most influential industry groups in North America to form the Produce  
14 Traceability Initiative ("PTI") which, in October 2008, launched an action plan setting forth  
15 voluntary standards for all produce brands shipping within or shipping into North America to  
16 meet.

17 19. The PTI proposed that every produce shipper, processor and repacker (hereafter  
18 "brand owners") be assigned a unique number, called a GS1-issued company prefix ("Company  
19 Prefix"). Under the PTI standards, every brand owner will be required to give every case-level  
20 SKU (stock keeping unit, such as each case of apples or bin of watermelons) they pack a unique  
21 number, and append this to their GS1-issued company prefix. The resulting combination is a  
22 unique 14 digit number called a Global Trade Item Number, or GTIN. The GTIN has several  
23 other attributes, including a packaging level prefix (which indicates whether it is an item, case  
24 or some other type of container), and a checksum suffix (which is an algorithm that ensures that  
25 the barcode reader correctly reads the code).

1           20.     Only one organization, GS1, can issue Company Prefixes. Each brand owner,  
2 however, is required to compile their own GTIN assignments, and ensure they comply with the  
3 industry standards. GS1 provides an online tool, called Data Driver, which was designed for  
4 generic consumer packaged goods to assist brand owners in assigning GTINs.

5           21.     There are several unique and inconspicuous anomalies of the produce industry  
6 that make Data Driver awkward for brand owners to use to create their GTINs. In response to  
7 this problem, YottaMark began to work on a produce-specific GTIN assignment mechanism in  
8 February 2009, with the goal of using such a mechanism to distinguish YottaMark and give it a  
9 competitive advantage in the marketplace.

10          22.     Between February 2009 and June 2009, YottaMark researched the PTI guidelines  
11 and best practices, studied the Data Driver tool, and interviewed authors of the new standard,  
12 together with industry experts and brand owners who were YottaMark customers and  
13 prospective customers. After substantial trial and error, over a period of five months, a  
14 YottaMark employee with a PhD in engineering from Cambridge University completed the  
15 HarvestMark GTIN Assignment Tool ("GTIN Assignment Tool").

16          23.     The GTIN Assignment Tool was created in Microsoft Excel. There were two  
17 final versions developed: one in which the line items could be entered in directly, and one that  
18 included a macro and drop down menus to help build the GTINs.

19          24.     The GTIN Assignment Tool included several unique features that represented  
20 substantial progress beyond Data Driver and which solved flaws in Data Driver, including, but  
21 not limited to:

- 22               a. Automatic calculation of number of items;  
23               b. User prompts to enter all the necessary attributes required to create a unique  
24 GTIN;  
25               c. Automatic detection of duplicated GTINs;  
26               d. Automatic calculation of correct checksums;



1 e. Automatic generation of both case and item-level GTINs;  
2 f. Logic allowing multiple packing configurations for identical items; and  
3 g. Logic permitting automatic completion of GTIN templates for retail  
4 customers.

5 25. The GTIN Assignment Tool version with macros included additional unique  
6 features including drop down menus, and nested menus, to define commodities, varieties,  
7 country of origin, and buttons to create and delete individual GTINs and logic to prevent  
8 duplicate GTIN creation.

9 26. **Other Proprietary Information.** Plaintiff also maintained other proprietary and  
10 trade secret information, including, but not limited to, compilations of data regarding its  
11 customers and prospects, including names and contact information for actual decision makers at  
12 each company, traceability needs and interests, summaries of reactions and comments in  
13 response to review of particular products, and scheduled future contact; confidential contract  
14 language and terms; and confidential business plans. This information relates to both Plaintiff's  
15 HarvestMark (agriculture) solutions and its YottaMark (consumer goods) solutions in the  
16 traceability industry, and derives independent economic value from not being generally known  
17 to persons outside Plaintiff's employ.

18 27. This proprietary information is maintained in strict confidence by Plaintiff.  
19 Computer access is password protected and limited to employees only. All employees are  
20 subject to confidentiality and non-disclosure agreements with Plaintiff. Plaintiff's employee  
21 handbook also specifies the importance of maintaining confidentiality in several places.  
22 Information is carefully controlled and sensitive information is distributed only to those  
23 employees who need access to it, and typically identified in writing as information that cannot  
24 be distributed outside of the company. Employees with access to confidential information,  
25 such as the sales staff, attend periodic meetings at which confidentiality is discussed.

26 28. This proprietary information derived both actual and potential independent  
27

1 economic value from not being generally known to the public or to other persons who could  
 2 obtain economic value from its disclosure, including TraceGains and other competitors in the  
 3 traceability industry.

#### 4 **FIRST CLAIM**

#### 5 Misappropriation of Trade Secrets 6 (Against All Defendants)

7 29. Plaintiff realleges and incorporates by reference each and every allegation  
 8 contained in paragraphs 1 through 28 of the Complaint with the same force and effect as if fully  
 9 set forth at length herein.

10 30. On or about August 28, 2006, Defendant Long accepted a position with  
 11 YottaMark, as Director of Business Development.

12 31. In the course of his work at YottaMark, Defendant Long had access to all of  
 13 YottaMark's confidential and proprietary information and trade secrets, including, but not  
 14 limited to, its GTIN Assignment Tool; customer lists; customer preferences; price lists; partner  
 15 agreements; and information regarding which customers/prospective customers were ready to  
 16 purchase Plaintiff's products.

17 32. On March 31, 2009, YottaMark's Chief Marketing Officer, Dr. Elliott Grant, the  
 18 author of the GTIN Assignment Tool, sent draft copies of the GTIN Assignment Tool to  
 19 YottaMark's Sales Team, including Long. The Sales Team was being shown the GTIN  
 20 Assignment Tool for marketing and demonstration purposes only and was given explicit  
 21 instructions by Dr. Grant: "Do not distribute this tool outside the company." That email was  
 22 accompanied by the company's Confidentiality Footer. True and correct copies of Dr. Grant's  
 23 email and copy of the GTIN Assignment Tool (v2.0) are attached hereto as Exhibits A and B,  
 24 respectively, incorporated herein by reference.

25 33. On or about April 2, 2009, Dr. Grant refined the tool, creating GTIN Assignment  
 26 Tool v4.0, which was distributed to the sales team on April 2, 2009. Dr. Grant again shared the  
 27 tool with YottaMark's sales force, as an attachment to an email which specified that the tool was



1 “not for distribution.” That email was also accompanied by the YottaMark confidentiality  
2 footer. True and correct copies of Dr. Grant’s email and copy of the GTIN Assignment Tool  
3 v4.0 are attached hereto as Exhibits C and D, respectively, and incorporated herein by reference.

4 34. On or about April 2, 2009, YottaMark notified Long that his compensation  
5 package was being realigned.

6 35. On or about June 3, 2009, YottaMark reorganized its Sales Division and  
7 eliminated Defendant Long’s position. Long was notified this same day that his position had  
8 been eliminated and his access to the YottaMark email system, Virtual Private Network, and  
9 Salesforce database was terminated immediately. Plaintiff informed Long that he was required  
10 to return all of Plaintiff’s proprietary information as soon as possible.

11 36. Throughout the period from April 2, 2009 through June 3, 2009, YottaMark’s  
12 Sales Team, including Defendant Long, marketed the GTIN Assignment Tool to its current and  
13 prospective customers, using it as evidence of YottaMark’s substantial innovation and superior  
14 system. At the time Defendant Long was laid off, there were multiple contract proposals being  
15 negotiated with current and prospective customers, many of which had been initiated over a year  
16 earlier, and which involved substantial time, effort and expense by YottaMark.

17 37. During a Webinar on May 28, 2009, YottaMark specifically identified its GTIN  
18 Assignment Tool as a unique feature of the HarvestMark offering. A TraceGains employee  
19 attended this Webinar without disclosing their identity, and, on information and belief,  
20 recognized the tool’s competitive value in the marketplace.

21 38. Defendant TraceGains is a direct competitor of YottaMark.

22 39. YottaMark is informed and believes and thereon alleges that starting in mid-June  
23 2009, Defendant Long became employed as the Senior Director of Business Development for  
24 TraceGains.

25 40. On or about June 17, 2009, YottaMark became concerned that Defendants Long  
26 and TraceGains were using or planning to use YottaMark’s confidential information and trade  
27

1 secrets, including, but not limited to, its GTIN Assignment Tool; customer lists; customer  
2 preferences; price lists; partner agreements; and information regarding which customers or  
3 prospective customers were ready to purchase YottaMark's products.

4 41. On June 17, 2009, Plaintiff's attorney sent cease and desist letters to Defendants  
5 TraceGains and Long informing and reminding them of the Agreement that Long signed while  
6 employed with YottaMark. Plaintiff also requested that Long return all of its confidential  
7 information still in his possession, including, but not limited to: a laptop computer, YottaMark  
8 and HarvestMark product price lists, paper and electronic copies of customer agreements,  
9 proposals and quotes, copies of YottaMark and HarvestMark template contracts including  
10 Customer License Agreements, Reseller Agreements, and Table License Agreements, customer  
11 specific presentations, YottaMark and HarvestMark product presentations, sales and business  
12 collateral, product samples, materials from YottaMark customers including label stock,  
13 packaging containers, customer and prospect lists and affiliated contract information, and  
14 YottaMark employee information, including contact information. True and correct copies of the  
15 cease and desist letters are attached hereto as Exhibit E and incorporated herein by reference.

16 42. On June 18, 2009, a YottaMark employee participated in a Webinar marketing  
17 presentation to prospective customers, in which TraceGains was a presenter. The Webinar  
18 included screenshots of TraceGains's new GTIN Management Module. A true and correct copy  
19 of the product presented as TraceGains's new GTIN Management Module is attached hereto as  
20 Exhibit F and incorporated herein by reference. TraceGains's new GTIN Management Module  
21 is virtually identical to the YottaMark GTIN Assignment Tool in the following respects:

22 a. It has an identical SKU Count Algorithm. The algorithm that takes the  
23 company prefix and determines how many individual items can be assigned is identical,  
24 including the placement on the page and heavy border;

25 b. The Error Check Algorithm has been renamed "Management," but is  
26 identical in every way, including color, placement and border;

1 c. It has identical wording. YottaMark used particular wording that was unique  
2 to the algorithm embedded in the tool, specifically, the user is asked to enter the Item Number as  
3 text, as the leading zeroes need to be preserved. The wording "Enter Item Number (as text)" is  
4 identical;

5 d. The column headings and order Commodity, Variety, Origin, Grade, Size and  
6 Growing Method are identical. These are listed in arbitrary order in the HarvestMark tool; and

7 e. The column arrangement, borders, placement, and user interface design is  
8 identical.

9 43. TraceGains made some minor cosmetic changes to disguise the GTIN  
10 Management Module's provenance, including:

11 a. removal of Plaintiff's HarvestMark logo and replacement with TraceGains's  
12 logo;

13 b. changing of colors of columns; and

14 c. rearrangement of the company data entry box.

15 44. During the June 18, 2009 Webinar, Defendant TraceGains took credit for the  
16 development of the GTIN Assignment Tool, by claiming that, "We've created a simple tool to  
17 help create your GTIN, calculate your check sum digits and manage that on a go forward basis."  
18 Plaintiff is informed and believes and thereon alleges that prior to Defendant Long's  
19 commencement as an employee at Defendant TraceGains, Defendant TraceGains did not have  
20 GTIN assignment capabilities remotely comparable to Plaintiff's GTIN Assignment Tool.

21 45. YottaMark monitors the competitive environment carefully, through press, trade  
22 shows, websites, seminars and Webinars. In addition, it tracks all known competitors to  
23 understand their competitive positioning. At no time prior to the TraceGains discovery on June  
24 18, 2009, had YottaMark seen any type of GTIN assignment tool, which had taken it five  
25 months to create, used by any competitor (other than the GS1-produced tool, Data Driver).

1           46.     On or about June 19, 2009, Long notified Bill Hoover, YottaMark's Vice  
2 President of Finance and Operations, that he shipped all of Plaintiff's equipment, including its  
3 laptop to his attention, after several requests by Plaintiff.

4           47.     On June 22, 2009, Plaintiff received its laptop computer that Long had retained.  
5 The records on the laptop computer returned to YottaMark by Defendant Long show that Long  
6 spent the two weeks after he was terminated by YottaMark reviewing proprietary files including  
7 customer lists, customer pricing structures, and the GTIN Assignment Tool, and downloading  
8 documents to an external hard drive. The records show that Long removed the HarvestMark  
9 logo and the copyright legend from the GTIN Assignment Tool and provided it to TraceGains.  
10 The records show that TraceGains executives asked Long to provide the GTIN Assignment Tool  
11 by email.

12           48.     On June 29, 2009, YottaMark then hired a forensic computer expert to examine  
13 Long's laptop. The consultant found that between Long's termination on June 3, 2009, when he  
14 was instructed to return all YottaMark assets including his company-issued laptop, and June 19,  
15 2009, when he ultimately returned the laptop, someone using Long's computer accessed  
16 YottaMark internal documents on the laptop including customer contracts for many of  
17 YottaMark's existing customers (including customers that Long never worked with), lead lists  
18 generated at trade shows and other events attended by YottaMark, saved a version of  
19 YottaMark's GTIN Assignment Tool with the copyright legend and the HarvestMark logo  
20 stripped out of it, accessed and modified files containing TraceGains' name, and exchanged  
21 dozens of emails with TraceGains' Vice President of Global Operations, Glenn Smith and  
22 TraceGains' Vice President of Sales, Robert Hudson.

23           49.     The consultant further discovered that on June 18, 2009 (during a relatively short  
24 period of time), someone using Long's computer (with a USB device plugged in) accessed a  
25 total of over sixty YottaMark internal documents containing confidential information, including  
26 lead lists and many of its customer contracts (even ones that Long never worked on), and its  
27

1 GTIN Assignment Tool. The consultant concluded that the accessing of these files in rapid  
2 succession at a time when the USB device was attached was consistent with the computer  
3 having copied the files from the laptop to the USB drive.

4 50. The consultant also determined that on June 18, 2009, someone using Long's  
5 computer (and logged into Long's Gmail account) visited a series of websites (allexperts.com,  
6 whitecanyon.com, and secure delete) and searched for "delete documents from computer".  
7 Evidence on the computer is consistent with someone having used some kind of permanent  
8 deletion software to delete some files, as there are links to TraceGains related files in the My  
9 Documents folder on the laptop, but forensic tools were unable to recover the files referenced.

10 51. The HarvestMark GTIN Assignment Tool represents months of intensive  
11 research, coordination with trade groups, and investment of resources by YottaMark and is most  
12 valuable between now and September 30, 2009. The other proprietary information  
13 misappropriated by Defendants represents years of YottaMark's investment in establishing itself  
14 in the traceability industry, including internal information about YottaMark's most valuable  
15 customer relationships.

16 52. The information misappropriated by Defendants was not known to Defendant  
17 TraceGains and is valuable to it. Defendants' use of this information harms YottaMark.

18 53. YottaMark differentiates itself in the market from companies such as TraceGains  
19 by developing innovative tools that make the prospect or customer's job easier. By  
20 misappropriating this tool and positioning it as their own, TraceGains is directly and materially  
21 affecting YottaMark's hard won position as the thought leader and innovator.

22 54. Plaintiff is informed and believes, and thereon alleges that Defendants have  
23 wrongfully used and are continuing their wrongful use of Plaintiff's confidential information,  
24 trade secrets, and information protected by copyright, including, but not limited to, its GTIN  
25 Assignment Tool, customer lists, customer preferences, price lists, partner agreements, and  
26  
27

1 information regarding which customers or prospective customers were ready to purchase  
2 Plaintiff's products.

3 55. In addition to monetary damages, Plaintiff has suffered irreparable and non-  
4 quantifiable injury to its customer relations, reputation, and goodwill.

5 56. At all times herein alleged Plaintiff acted reasonably to protect and maintain the  
6 confidential nature of its proprietary information, including, but not limited to, its GTIN  
7 Assignment Tool, customer lists, customer preferences, price lists, and information regarding  
8 which customers or prospective customers were ready to purchase Plaintiff's products.

9 57. TraceGains accepted Plaintiffs' trade secrets from Long, with full knowledge that  
10 what they were accepting were trade secrets belonging to Plaintiff. Moreover, TraceGains used  
11 said trade secrets of Plaintiff, including, but not limited to, its GTIN Assignment Tool, and  
12 falsely advertised it as TraceGains' own creation.

13 58. The aforementioned acts of misappropriation of Plaintiff's trade secrets by  
14 Defendants Long and TraceGains constitute violations of both California common law and the  
15 Uniform Trade Secrets Act, Civil Code Section 3426 et al.

16 59. As a direct and proximate result of said misappropriation of trade secrets, Plaintiff  
17 has suffered damages in an amount to be proven at trial.

18 60. Plaintiff is also entitled to a temporary, preliminary and permanent prohibitory and  
19 mandatory injunction to enjoin Defendants Long and TraceGains from any future use of  
20 Plaintiff's trade secrets, confidential information, and information protected by copyright  
21 including, but not limited to, its GTIN Assignment Tool, customer lists, customer preferences,  
22 price lists, partner agreements, information regarding which customers or prospective customers  
23 were ready to purchase Plaintiff's products from all regions in which is sells its products.

24 61. At all times herein mentioned, the Defendants, and each of them, were the agents,  
25 servants, and employees of each of the other Defendants, as well as the agents of all Defendants,  
26 and at all times herein mentioned were acting within the scope of said agency and employment.



62. At all times herein mentioned, Defendants, and each of them were members of, and engaged in, a joint venture and common enterprise and acted within the course and scope in pursuance of said joint venture and enterprise.

63. At all times herein mentioned, the acts and omission of the various defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other defendants in proximately causing the injuries and damages as herein alleged.

64. Defendants, and each of them, ratified each and every act or omission complained of herein.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

**SECOND CLAIM**

Copyright Infringement  
(Against All Defendants)

65. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 28 of the Complaint with the same force and effect as if fully set forth at length herein.

66. Prior to April 2, 2009, Plaintiff created and wrote an original spreadsheet tool entitled GTIN Assignment Tool.

67. This tool was written using Microsoft Excel, which Plaintiff does not claim as its original work, but also contains a large amount of material wholly original with Plaintiff and is copyrightable subject matter under the laws of the United States.

68. Since April 2, 2009, the tool has been published by Plaintiff in strict conformity with all laws governing copyright.

69. Since April 2, 2009, Plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyright in the tool.

70. After June 3, 2009, Defendants infringed the copyright by publishing and representing a tool entitled GTIN Management Module as part of its traceability services for customers, which was copied largely from Plaintiff's copyrighted tool entitled GTIN

1 Assignment Tool. A copy of each document is attached hereto as Exhibits B and D,  
2 respectively.

3 71. After June 3, 2009, and continuously since about June 18, 2009, Defendants have  
4 been publishing, selling and otherwise marketing the tool entitled GTIN Management Module.

5 72. Plaintiff is informed and believes and thereon alleges that Defendant Long gave the  
6 GTIN Assignment Tool to TraceGains.

7 73. By the conduct described in this complaint, the Defendants have been engaging in  
8 unfair trade practices and unfair competition against Plaintiff to Plaintiff's irreparable damage.  
9 Defendants are using and presenting the GTIN Assignment Tool as their own, for their own  
10 profit, pecuniary gain and advancement, and Defendants are deriving and will continue to derive  
11 revenue and acclaim from this violation of Plaintiff's rights.

12 74. Although the Defendants had full knowledge that YottaMark's work was protected  
13 by copyright laws of the United States, they willfully infringed the copyright when by blatantly  
14 and substantially copying YottaMark's work, and publishing, distributing and selling the  
15 infringing material in the United States and perhaps internationally. As a result, Defendants  
16 should be liable to YottaMark for punitive damages.

17 WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

### 18 **THIRD CLAIM**

19 Accounting  
20 (Against All Defendants)

21 75. Plaintiff realleges and incorporates by reference each and every allegation  
22 contained in paragraphs 1 through 28 and 66 through 74 of the Complaint with the same force  
23 and effect as if fully set forth at length herein.

24 76. As a consequence of Defendants' infringement of Plaintiff's copyrighted GTIN  
25 Assignment Tool, YottaMark is entitled to an accounting from Defendants for all gains, profits  
26 and advantages derived by Defendants from their publication, license, distribution, and sale of  
27 the infringing GTIN Management Module.

77. Based on this accounting, Defendants should pay over to YottaMark statutory damages and all sums derived by way of profit from the publication, license, distribution, sale or other disposal of the infringing material.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

#### **FOURTH CLAIM**

Conspiracy  
(Against All Defendants)

78. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 77 of the Complaint with the same force and effect as if fully set forth at length herein.

79. Defendants Long and TraceGains, between and amongst themselves, had knowledge of and agreed to misappropriate trade secrets belonging to Plaintiff for their own benefit and to Plaintiff's detriment.

80. Defendants Long and TraceGains, as part of their objective and conduct, offered, accepted, and used Plaintiff's trade secrets, including, but not limited to, its GTIN Assignment Tool; customer lists; customer preferences; price lists; partner agreements; information regarding which customers/prospective customers were ready to purchase Plaintiff's products from all regions in which is sells its products.

81. Defendants Long and TraceGains, as part of their objective and conduct, used Plaintiff's trade secrets to solicit Plaintiff's customers away from Plaintiff.

82. As a direct and proximate result of said conspiracy, Plaintiff has suffered damages in an amount to be proven at trial.

83. Plaintiff is also entitled to a temporary, preliminary and permanent prohibitory and mandatory injunction to enjoin Defendants Long and TraceGains from any future use of Plaintiff's trade secrets, confidential information, and information protected by copyright including, but not limited to, its GTIN Assignment Tool; customer lists; customer preferences;

price lists; information regarding which customers/prospective customers were ready to purchase Plaintiff's products from all regions in which is sells its products.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

**FIFTH CLAIM**

Breach of Contract  
(Against Defendant Long)

84. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 83 of the Complaint with the same force and effect as if fully set forth at length herein.

85. As part of his employment with Plaintiff, Long received and executed a "Nondisclosure Agreement" ("NDA Agreement"). A true and correct copy of the NDA Agreement is attached hereto as Exhibit G and incorporated herein by reference.

86. As a condition of his employment with Plaintiff, Long executed an offer letter ("Offer Letter") which provided that his employment was contingent upon his execution of a Proprietary Information Agreement which prohibits the use or disclosure of Plaintiff's proprietary information and that the Proprietary Information Agreement ("PIA") formed the binding terms of his employment. A true and correct copy of the Offer Letter is attached hereto as Exhibit H and incorporated herein by reference.

87. The PIA explicitly prohibits the disclosure of proprietary and confidential information. A true and correct copy of the PIA is attached hereto as Exhibit I and incorporated herein by reference.

88. As part of his employment with Plaintiff, Long also received an Employee Handbook ("Employee Handbook"). True and correct copies of relevant portions of the Employee Handbook are attached as Exhibit J and incorporated herein by reference.

89. At all times since Long signed said Agreements and accepted the Employee Handbook, Plaintiff has performed all of the conditions of the Agreement that were to be performed on its part and complied with all terms of the Employee Handbook.

90. By said Agreement and Employee Handbook, Long agreed that he would not at any time, without consent of Plaintiff, disclose or use for his own benefit or to the business disadvantage of Plaintiff any proprietary information of Plaintiff, except as necessary in the course of his employment with Plaintiff.

91. In the course and scope of his employment, Long also provided and negotiated the customer contract terms and non-disclosure agreements which included strict agreements to confidentiality, including obligations of YottaMark not to disclose information regarding customers or prospects outside of YottaMark. Long was fully aware of these agreements, which YottaMark has with each of its customers and with numerous prospects.

92. Long, without Plaintiff's permission, knowledge or consent, materially breached said NDA Agreement, Offer Letter conditions, PIA, employee handbook, and agreements between YottaMark and its customers and prospects by taking and using Plaintiff's proprietary information, including, but not limited to, its GTIN Assignment Tool, customer lists and other confidential customer information, to his own advantage and to the business disadvantage of Plaintiff by, among other things, offering said proprietary information and using said proprietary information on behalf of Plaintiff's competitors.

93. As a direct and proximate result of said wrongful breach of the Agreements, Plaintiff has suffered damages in an amount to be proven at trial.

94. Plaintiff is also entitled to a temporary, preliminary and permanent prohibitory and mandatory injunction to enjoin any future use of Plaintiff's trade secrets, confidential information, and information protected by copyright including, but not limited to, its GTIN Assignment Tool, customer lists, customer preferences, price lists, partner agreements, information regarding which customers or prospective customers were ready to purchase Plaintiff's products from all regions in which is sells its products.

## PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1           1.     For temporary, preliminary and permanent prohibitory and mandatory injunctive  
2 relief to enjoin Defendants Long and TraceGains from any future use of Plaintiff's trade secrets,  
3 confidential information, and information protected by copyright including, but not limited to,  
4 its GTIN Assignment Tool, customer lists, price lists; partner agreements; information regarding  
5 which customers or prospective customers were ready to purchase Plaintiff's products from all  
6 regions in which is sells its products, and for return of all such information and materials in their  
7 possession or control;

8           2.     For general damages in an amount unknown at the present time, all according to  
9 the proof to be presented at trial;

10          3.     For consequential damages in an amount unknown at the present time, all  
11 according to the proof to be presented at trial;

12          4.     For punitive and exemplary damages;

13          5.     For an accounting of profits derived by Defendants from the publication, license,  
14 distribution, sale or other disposal of the infringing material, and a judgment for the damages  
15 disclosed by the accounting, including:

16               a.   Damages provided by statute for Defendants' statutory copyright  
17 infringement; and


18               b.   All monies determined to be profits generated or arising from the infringing  
19 material;

20          6.     For costs of suits, including reasonable attorneys' fees pursuant to Cal. Civil  
21 Code § 3426.4 and 17 U.S.C. § 505;

22          7.     For such other and further relief as the Court may deem proper.

23 Dated: July 7, 2009

FITZGERALD ABBOTT & BEARDSLEY LLP

24  
25 By   
26 Richard T. White  
27 Attorneys for Plaintiff YottaMark, Inc.